WONG YEW MING

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
GUNN CHIT TUAN SCJ
MOHD. JEMURI SERJAN SCJ
[SC CRIMINAL REFERENCE NO. 1 OF 1987]
11 OCTOBER 1990

EVIDENCE: *Dangerous drugs - Whether evidence of previous selling of dangerous drugs admissible - Prejudicial to the accused - Relevance - Section 37 Dangerous Drugs Act 1952.*

The applicant W was charged with his wife with the offence of trafficking in drugs weighing 250 grammes of heroin under s. 39B(1) of the Dangerous Drugs Act 1952 (the Act); at the end of the prosecution case, W's wife was acquitted and W was called upon to enter his defence after which he was convicted and sentenced. His appeal to the High Court was dismissed.

The question for the determination of the Supreme Court was whether, in relation to an offence under s. 39B(1) of the Act, evidence may be admitted that on previous occasions the accused had sold such dangerous drugs although such evidence is prejudicial to the accused. The evidence referred to was that of PW8.

Held:

[1] (a) On the facts of this case, the amount of heroin exceeded the amount which invoked the presumption of trafficking under s. 37 of the Act.

(b) However, the prosecution adduced further evidence in the form of PW8's evidence, probably because of the fact that the drugs were found in 8 separate places.

(c) PW8's evidence is clearly admissible as it was relevant to show knowledge and that the possession of the drugs by W was not accidental.

[2] The definition of "trafficking" in the Act is very wide and the definition begins with the word "trafficking includes" (contra s. 2 Singapore Misuse of Drugs Act 1973).

[Evidence as to selling of dangerous drugs by accused on previous occasions held to be admissible.]

Cases referred to:
Poon Soh Har & Anor. v. PP[1977] 2 MLJ 126
Teh Geok Hock v. PP[1989] 3 MLJ 163

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37, 39B(1), (2)
Misuse of Drugs Act 1973 [Sing], s. 2

For the applicant - R. Rajasingam (K. Chandra with him); M/s. K. Chandra & Co.
For the respondent - Mohd. Yusof Hj. Zainal Abidin; DPP

JUDGMENT

Hashim Yeop Sani CJ (Malaya):

The following question of law of public interest was posed before this Court namely:

> Whether in a trial in which an accused is charged for trafficking in respect of a particular quantity of dangerous drug, to wit, heroin, at a particular place and time, evidence may be admitted that on previous occasions he had sold dangerous drugs, although such evidence is prejudicial to the accused.

After hearing arguments we answered this question in the affirmative.

The applicant was originally charged under s. 39B(1) of the Dangerous Drugs Act 1952 (the Act) together with another co-accused, his wife. The charge stated that the accused on 3 August 1982 at about 1.30 p.m. at a house No. 22, Persiaran Cempaka Sari 19, Taman Cempaka, Ipoh, Perak did traffic in dangerous drug to wit, heroin weighing about 250 grammes in contravention of the said section of the Act. At the close of the prosecution case the co-accused was acquitted and the applicant was called upon to enter his defence. At the conclusion of the trial the applicant was convicted and sentenced to life imprisonment and six strokes of the rotan. His appeal to the High Court was dismissed.

Section 37 of the act provides for the presumption of trafficking. At the date stated in the charge the presumption would apply in respect of any person found in possession of 100 grammes or more of heroin. The provision was subsequently amended by Act 553 which took effect on 14 April 1983. Act 553 also repealed the discretion of the Court to impose a sentence of life imprisonment under s. 39B(2) of the Act.

At the date stated in the charge and at time of the trial the amount of heroin found by the trial Court to be in the applicant's possession in fact exceeded the amount which invoked the presumption of trafficking under the Act. Notwithstanding the presumption the prosecution sought to bring home the charge against the applicant by calling additional evidence from two self-confessed drug addicts namely PW8 and PW9. PW8's evidence is the relevant evidence in this application because it related to the charge against the applicant.

Part of the evidence of PW8 which is the subject matter of the question read as appears in the appeal record as follows:

> I paid RM45 for a straw tube from accused 1. I did not see where he got the drugs. I was in the house and I saw him go out of the house to get the drugs. He went out through the main door; but was within the compound of the house. He came back not more than 5 minutes later. He handed over, the drugs to me.

Further down in his evidence he also said:

> Each time I bought a straw tube for RM45. 1st accused handed me the drugs on every occasion. I handed him the money. I did not buy any drugs from accused 2. Over these 20 times, I did not see where accused 1 got the drugs from.

The learned President of the Sessions Court who convicted the applicant referred to PW8's evidence in his grounds of judgment as follow.

> The prosecution, even with the evidence as summarised above, had made out of a *prima facie* case against the accused. It went further to call two self-confessed drug addicts Cheong Yew Kong (PW8) and Kok Chuan Leong (PW9). PW9 bought the drugs from 2nd accused (female) but did not see where she got the drugs from; 1st accused (male) was in the hall at

that time. PW8 said he bought half a straw tube of drugs from 1st accused almost every day for about twenty (20) occasions and he paid RM45 on each occasion. PW8 identified the weighing scale P29 as the one which he had bought from a friend, Simon, in 1976.

Further down in his grounds of judgment the learned President dealt with the law on the evidence of PW8 as follows:

> Trafficking in drugs is not a matter that goes on for one day only; it can go on for weeks or months. On days previous to 3 August 1982, smaller quantities were trafficked but on that day itself, 117.9 grammes were available for trafficking. Section 15 of the Evidence Act reads as follows:
>
> > When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that the act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.
>
> Section 37(da) of the DDA presumed a person found in possession of more than 100 grammes of drugs to be trafficking in drugs.

When the case went on appeal to the High Court a number of issues were raised before the learned Judge and on the question of evidence of PW8 (and PW9) the learned Judge ruled as follows in his grounds of decision:

> With respect I am of the view that the evidence of PW8 and PW9 is admissible. The evidence does not show a bad character. It shows system. It shows that the accused is known to have been dealing with drugs.

Further down in his grounds of decision the learned Judge concluded that the evidence of PW8 was relevant to prove that the accused had committed the offence of trafficking and therefore his evidence was admissible.

As correctly pointed out by the learned President the prosecution could have relied solely on the weight of the heroin found in the possession of the applicant to invoke the presumption of trafficking under the Act. But the prosecution went further. It is probable that the prosecution was not sure that the Court would make a finding that the applicant was in possession of the drug as a whole because drug was found in eight separate holes - six in the compound of the house and two outside the fence. In these holes were found rolled up plastic packets of the drug buried. It was perhaps a novel way of keeping the drug in separate compartments, each with an amount below the statutory amount which would have invoked the presumption of trafficking in law.

In the context of the Act PW8's evidence is in our view clearly admissible. The prosecution wanted to show that on previous occasions the applicant had sold drugs and therefore had been trafficking in drugs. In our law when the statutory amount of drug is proved to be in the possession of any person the presumption is invoked and the person shall be presumed until the contrary is proved, "to be trafficking" in the said drug. Under the Act possession of the statutory amount of drug is trafficking. PW8's evidence was relevant to show knowledge and that the possession of the drug by the applicant was not accidental.

A Singapore case, *Poon Soh Har & Anor. v. Public Prosecutor* [1977] 2 MLJ 126 dealt with somewhat similar type of evidence. But we would like to express the following caution when referring to that case. Firstly, the definition of "trafficking" under s. 2 of Singapore Misuse of Drugs Act 1973 is differently worded from the definition of "trafficking" in our Act. Section 2 of the Singapore Act deals with specific activities and the word "means" in the definition there certainly restricts the scope of the definition. The definition of "trafficking"

in our Act is very wide and the definition begins with the words "trafficking includes". See also *Teh Geok Hock v. Public Prosecutor* [1989] 3 MLJ at p. 163 on the definition of "trafficking". Secondly, the Singapore Act (referred to in Poon Soh Har) provided that any person to have had in his possession more than the statutory amount of the drug shall, until the contrary is proved, be presumed not to be "trafficking" but to have had such drug in his possession "for the purpose of trafficking" therein.

In this case the evidence of PW8 is admissible not because it tends to show that a person committing one offence is likely to commit another but to show knowledge or intention of the applicant and that the possession is not accidental.

Accordingly the answer to the question posed must be in the affirmative.

Also found at [1990] 2 CLJ 946